85-1622

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

STEVEN TODD ANDERSON, formerly
Steven Todd Jenkins,

Petitioner,

vs.

STATE OF MINNESOTA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

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QUESTIONS PRESENTED

I. Was petitioner deprived of a fair and impartial jury trial because Minnesota's mechanistic application of its evidentiary rules precluded him from presenting witnesses on his behalf contrary to the Sixth and Fourteenth Amendments?

II. Did petitioner receive an impartial jury trial when he was deprived of any right to question the jury when the circumstances gave rise to an inference that there may have been prejudice and/or improper influence?

PARTIES

All parties to the proceeding appealed from appear in the caption of the case.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties	ii
Table of Contents	iii
Table of Authorities	iv
Opinions Below	1
Jurisdiction	1
Constitutional Provisions and Statutes	2
Statement of the Case	4
Reasons for Granting the Petition	10

Appendix

Judgment and Opinion of the Minnesota Supreme Court	A-1
Minnesota Rules Of Evidence	
Rule 402	A-52
Rule 405	A-52
Rule 702	A-53
Rule 703	A-53
Minnesota Rules of Criminal Procedure, Rule 26.03, Subd. 5(1)	A-54

TABLE OF AUTHORITIES

Cases	Page
Barefoot v. Estelle, 463 U.S. 880, 103 S.Ct. 3383 (1983)	18
Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038 (1973).	15-16,24
Commonwealth v. Vitello, 381 N.E.2d 582 (Mass.1978)	25
Estes v. State of Texas, 85 S.Ct. 1628 (1965)	28
Frye v. United States, 293 F. 1013, 1014 (D.C.Cir.1923)	22
Green v. Georgia, 442 U.S. 95, 99 S.Ct. 2150 (1979)	16
Hughes v. Mathews, 576 F.2d 1250 (7th Cir.1977), cert. dismissed sub nom, Israel v. Hughes, 439 U.S. 801, 99 S.Ct. 43 (1978), affirming 440 F.Supp. 1272 (E.D.Wis.1977) ...	20
Irvin v. Doud, 366 U.S. 717, 81 S.Ct. 1639 (1961)	30
Israel v. McMorris, 643 F.2d 458 (7th Cir.1981), cert. denied, 455 U.S. 967, 102 S.Ct. 1479	25
Remmer v. United States, 350 U.S. 377, 76 S.Ct. 425 (1956)..	11,29
Schwartz v. Minneapolis Suburban Bus Co., 258 Minn.	

325, 104 N.W.2d 301 (1960) 26

State v. Bouwman, 328 N.W.2d 703 (Minn. 1982) 19

State v. Brown, 345 N.W.2d 233 (Minn.1984) 19

State v. Dorsey, 87 N.M. 323, 532 P.2d 912 (1975), affirmed 88 N.M. 184, 539 P.2d 204 (1975) 24

State v. Hawkins, 260 N.W.2d 150 (Minn.1977) 21

State v. Williams, 388 A.2d 500 (Maine 1978) 23

Turner v. State of Louisiana, 379 U.S. 466, 85 S.Ct. 546 (1965) 10,28

United States v. Downing, 753 F.2d 1224 (3d Cir.1985) 23

United States v. Lawson, 653 F.2d 299 (7th Cir.1981) 19

United States v. Sims, 514 F.2d 147, 149 (9th Cir.1975), cert. den., 423 U.S. 845, 96 S.Ct. 83 19

Washington v. State of Texas, 388 U.S. 14, 87 S.Ct. 1920 (1967) 10,12-13

Constitutional Provisions, Statutes and Rules

United States Constitution
Amendment 14 8,12-15
Amendment 6 8,10-12,23

Minnesota Rules of Evidence
Rule 402 22
Rule 405 22
Rule 702 22
Rule 703 18

Minnesota Rules of Crim. Proc.
Rule 26.03, subd.5(1).. 9

Treatises :

3 J. Weinstein & M. Berger, Weinstein's Evidence (1986), par. 702[03] 22-23

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PETITION FOR WRIT OF CERTIORARI
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OF MINNESOTA

Steven Todd Anderson, your petitioner, prays that a Writ of Certiorari issue to review the Judgment and Opinion of the Supreme Court for the State of Minnesota entered January 31, 1986.

OPINIONS BELOW

The opinion of the Minnesota Supreme Court is reproduced in the Appendix hereto. This decision is reported at State v. Anderson, 379 N.W.2d 70 (Minn. 1986).

JURISDICTION

The judgment of the Minnesota Supreme Court was entered on January 31, 1986. This petition is being docketed within 60 days of the entry of judgment in compliance with Rule 20.1 of the Rules of this Court. The jurisdiction of this court is invoked under 28 U.S.C., section 1257 (3). This federal question was raised as discussed at page 8-10, infra.

CONSTITUTIONAL PROVISIONS AND STATUTES

United States Constitution, Fourteenth Amendment, §1 --

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Sixth Amendment to the Constitution of the United States:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Minnesota Rules of Evidence 402, 405, 702 and 703; and Minnesota Rule of Criminal Procedure 26.03, subd. 5(1), are set forth in full in the Appendix hereto.

STATEMENT OF THE CASE

Steven Anderson (then Steven Jenkins) was tried for the first degree murder of Rudolph Blythe and Deems Thulin in Lincoln County, Minnesota. He was convicted of the first degree murder of Blythe and the second degree murder of Thulin on April 26, 1984. the trial was accompanied by extensive publicity, because the murder victims were bankers and the defendant's father (who took his own life before the trial) was an embittered farmer whose land had been lost to the bank.

On September 29, 1983, Rudolph Blythe, president of the Buffalo Ridge State Bank of Ruthton, Minnesota, and Deems Thulin, a loan officer of that bank, drove to an uninhabited farm now owned by the bank. The farm had been owned and

operated, from 1977 to 1980, by the defendant's father, James Jenkins. In May of 1983, James Jenkins began an active attempt to resume farming, but he was unable to obtain the credit necessary to make that attempt successful. He was bitter about the loss of his farm to the bank, and blamed the bank and Rudolph Blythe for his inability to get credit.

On September 28, 1983, James Jenkins called Blythe at the bank and, posing as a prospective purchaser of his former farm, arranged to meet Blythe there the following morning. James Jenkins indicated to defendant that he intended "to scare the hell out of him." Blythe and Thulin were shot and killed at the farm that morning. Defendant testified that he hid behind the garage the entire time and that James Jenkins committed the murders. The State's case that defendant,

and not James Jenkins, was the murderer was based upon circumstantial reconstruction evidence and inferences about the capabilities of James Jenkins.

The trial turned on the credibility of the defendant's testimony that he was hiding behind the garage, and the State's assertion that James Jenkins was unlikely to have been capable of accomplishing the shootings. If defendant was in fact hiding behind the garage, he could not have done the shootings. Defendant, 18 years old at the time, clearly had the ability to physically accomplish the shootings. James Jenkins, age 46, was trained in the use of the murder weapon. The State successfully argued, however, that his vision and physical dexterity would have made it difficult for him to accomplish the shootings.

However, the jury was not permitted to hear significant evidence which could well have convinced them that James Jenkins in fact committed the murders. The trial court refused to allow the jury to hear expert psychiatric testimony about James Jenkins' mental state, about his proclivity toward such outrageous and vicious acts, and about the incredible influence and duress James Jenkins exercised over the defendant. The trial court also refused to admit evidence concerning the character of James Jenkins, offered to show that he had the motive to commit this crime and the character and capacity both to plan and prepare for the crime and to compel defendant's presence there.

The trial court also excluded the results of polygraph tests that indicated defendant was telling the truth about

hiding behind the garage, and testimony of the polygraph experts as to their opinion on the defendant's character for veracity. The credibility of the defendant was extremely crucial to the outcome of this case, and the failure to admit the polygraph evidence deprived him of his Sixth Amendment right to present witnesses on his behalf.

At the time of trial, the State brought a motion in limine to exclude the above evidence, and defendant then raised, in opposition to such motion, the issue that exclusion of this evidence would deny defendant a fair and impartial jury trial because, contrary to the Sixth and Fourteenth Amendments, defendant would thereby be denied the right to present witnesses on his behalf. The issue was again raised in defendant's post-trial motion for a new trial. The Minnesota

Supreme Court acknowledged defendant's position on these constitutional issues (Opinion, p. 16, A-4), but upheld the admission of the evidence without expressly ruling on the constitutional questions.

Following return of the jury verdict, the defendant moved for a hearing to question the jury about possible improper influences and pressures. Defendant submitted affidavits showing that one juror felt she had been under tremendous pressure to convict, that jurors had freely commingled with the press and others during trial, and that a newspaper reporter had conversed with the jury foreperson during the trial. In addition, the court violated its own rules (Minn. R.Crim.P. 26.03, subd. 5(1)), by failing to sequester the jury during the trial. Defendant asserted, in its motion

to the trial court and on appeal, that denial of this hearing and lack of sequestration denied him a fair trial under the Sixth Amendment.

REASONS FOR GRANTING THE WRIT

This case presents fundamental Sixth and Fourteenth Amendment issues which go to the heart of the jury system and due process for criminal defendants. The court below limited the defendant's right to call witnesses in his behalf, contrary to this court's holding in Washington v. State of Texas, 388 U.S. 14, 87 S.Ct. 1920, 1925 (1967). The court also limited a defendant's right to question the jury in a way that severely hampers inquiry into possible jury prejudice, contrary to this Court's holdings in Turner v. State of Louisiana, 379 U.S. 466, 85 S.Ct. 546

(1965), and Remmer v. United States, 350 U.S. 377, 76 S.Ct. 425, 428 (1956).

These issues are recurring questions of crucial importance to the jury trial right in a criminal proceeding, and of overwhelming importance in the case at hand. Here an 18 year old boy was convicted of first degree murder. Hampered by restrictions on his right to present witnesses on his behalf, he was not given a fair opportunity to demonstrate that his father, not he, committed the murders. Despite the strong possibility that the jury verdict was tainted by impermissible influences, he was not given a fair opportunity to discover if this was the case. The severe and hypertechnical restrictions placed on this defendant by the Minnesota courts deprive defendants of the fair and impartial trial guaranteed by the Sixth

and Fourteenth Amendments.

I. DEFENDANT WAS DEPRIVED OF HIS RIGHT TO CALL WITNESSES ON HIS BEHALF.

The Sixth Amendment to the Constitution of the United States declares than an accused has "the right to... have compulsory process for obtaining witnesses in his favor...." This provision is applicable to state criminal proceedings under the Fourteenth Amendment's due process clause. The fundamental right guaranteed by this Sixth Amendment provision is not simply the right to use compulsory process, but the accused's right to present witnesses on his behalf. Washington v. State of Texas, 388 US 14, 87 S.Ct. 1920, 1925 (1967).

Washington was a murder case in which the defendant attempted to prove his innocence by showing that another

person did the killing. The Texas rules of evidence precluded testimony by this other person because he also had been charged in the matter. The Supreme Court held that the exclusion of this evidence deprived the accused of his right to present a defense, in violation of the Sixth and Fourteenth Amendments (87 S.Ct. at 1925):

> [I]n view of the recognition in the Reid [United States v. Reid, 12 How. 361, 13 L.Ed. 1023 (1852)] case that the Sixth Amendment was designed in part to make the testimony of a defendant's witness admissible on his own behalf in court, it could hardly be argued that a State would not violate the clause if it made all defense testimony inadmissible as a matter of procedural law. It is difficult to see how the Constitution is any less violated by arbitrary rules that prevent whole categories of defense witnesses from testifying on the basis of a priori categories that presume them unworthy of belief.

The state in this case prevented Steven Anderson from presenting a defense by precluding whole categories of

witnesses from testifying on his behalf. Because the rules used to prevent him from presenting these witnesses are arbitrary and unduly constrained his defense, this court must find that the state procedural rules, as here applied, violate the Sixth and Fourteenth Amendments.

Refusal to allow evidence of the father's character.

The evidentiary rulings below precluded the defendant from demonstrating that his presence at the scene of the murders was the result of incredible duress on the part of his overbearing and cruel father. The accused asserted throughout that his father had committed the murders and that his father had compelled his presence there on the day of the killing. The accused was unable to call the father because the father killed himself before he could be apprehended.

In order to overcome this formidable hurdle, the defendant was forced to use secondary evidence to demonstrate to the jury his defense. Utilizing the hearsay rule and other state procedural rules, the trial court excluded evidence of the father's cruelty and ferocity in the form of the testimony of neighbors and other witnesses to this behavior and in the form of psychiatric testimony. Without the benefit of this evidence, the jury could not properly assess the accused's defense, and the conviction was the result of violation of the accused's rights under the Sixth and Fourteenth Amendments.

In Chambers v. Mississippi, 410 US 284, 93 S.Ct. 1038 (1973), this court held that such mechanistic application of the hearsay rule violates the Sixth Amendment because it defeats

justice by unreasonably precluding the presentation of a defense (93 S.Ct. at 1049):

> Few rights are more fundamental than that of an accused to present witnesses in his own defense. [Citations omitted.] **** [W]here constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice.

See also, Green v. Georgia, 442 US 95, 99 S.Ct. 2150 (1979).

In this case, as in Washington, Chambers, and Green, arbitrary procedural rules prevented the jury from hearing evidence from which it might have concluded that someone other than the accused committed the murder.

The expert psychiatric testimony offered would have shown that the father was mentally unbalanced, if not insane.

The trial court excluded the psychiatric evidence on the ground that it was based upon hearsay. Given the fact that the father was dead, the only evidence available to the accused on this question was hearsay. The hearsay consisted of interviews with the father's wife, friends, neighbors, and the accused. The court also based its exclusion on the ground that the evidence offered "related to the influence of the father over his son and this was a matter within the common experience of a jury." It clearly is not true that the jurors had the experience from which to evaluate the bizarre and abnormal psychological state of the accused's father. It is precisely because every juror had some experience with more normal father-son relationships that they were in need of the aid of one whose expertise involves abnormal

behavior. Psychiatric expert opinion commonly is based on hearsay. In Barefoot v. Estelle, 463 US 880, 103 S.Ct. 3383 (1983), this court approved admission of psychiatric testimony, without personal examination of the subject, on behalf of the prosecution, stating (103 S.Ct. at 3399):

> Whatever the decision may be about the use of psychiatric testimony, in general, on the issue of future dangerousness, petitioner urges that such testimony must be based on personal examination of the defendant and may not be given in response to hypothetical questions. We disagree. Expert testimony, whether in the form of an opinion based on hypothetical questions or otherwise, is commonly admitted as evidence where it might help the factfinder do its assigned job.

Rule 703 of Minnesota's Rules of Evidence, identical to FROE, Rule 703, permits the opinion of an expert to be admitted at trial even if it is based on hearsay, if such hearsay is normally

relied upon by experts in the field. See U.S. v. Sims, 514 F2d 147, 149 (9th Cir. 1975), cert. denied, 423 US 845, 96 S.Ct. 83. In U.S. v. Lawson, 653 F2d 299, 301-303 (7th Cir. 1981), the Seventh Circuit held that this rule required the admission of the expert opinion of a psychiatrist on behalf of the prosecution even though it was based upon hearsay and no private interview had taken place.

Under Minnesota law, psychiatric testimony is relevant and competent on the mental state and sanity of a person, but not admissible as to the diminished capacity or lack of specific intent of a defendant. State v. Brown, 345 NW2d 233 (Minn. 1984); State v. Bouwman, 328 NW2d 703 (Minn. 1982). Because such psychiatric testimony is relevant and competent herein, its arbitrary exclusion herein was a denial of the accused's right

to present evidence. Hughes v. Mathews, 576 F2d 1250 (7th Cir. 1977), cert. dismissed sub nom., Israel v. Hughes, 439 US 801, 99 S.Ct. 43, 58 L.Ed.2d 94 (1978), affirming 440 F.Supp. 1272 (ED Wis. 1977).

The accused offered evidence of his father's extreme cruelty in the testimony of witnesses who had seen him throw wild fits of temper, commit outrageous and sadistic acts, and make violent threats to his own life and the lives of others. The trial court limited the admission of this evidence to acts either directly related to the murder in question or acts committed in the presence of the accused.

Under Minnesota procedure, evidence of another person's character is admissible when the defendant offers the defense that the other person committed

the crime. State v. Hawkins, 260 NW2d 150 (Minn. 1977). The character of the father in this case was admissible because it was not offered to show that the acted in conformity therewith. The specific acts were admissible to show his character because they went to his motive, intent, preparation, etc. Minn. Rules of Evidence, Rule 404. The defense of duress in particular depended upon the jury understanding how a father could be motivated to so abuse his son. The actual shootings were carried out in a sadistic and violent manner, and the defense was harmed irreparably when it was precluded from showing that the character and temperament of the father gave him the motivation to commit this crime and provided the capacity to plan and prepare for this crime.

Because the father's character was

thus an essential element of the accused's defense, it could be proved by reputation or opinion testimony or by specific instances of conduct. Minn.R.Ev., 405. By mechanistically and arbitrarily limiting the admission of this evidence, the Minnesota courts impermissibly and unconstitutionally precluded the accused from presenting his defense.

The polygraph test results

There was no question that the polygraph examiner was highly qualified in his field. He relied on data reasonably relied upon in his field. The Minnesota courts relied on Frye v. United States, 293 F 1013, 1014 (DC Cir. 1923), to hold this evidence inadmissible. However, subsequent to Frye, Minnesota, like the federal courts, has adopted Evidence Rules 702 and 402 (broad scope of relevance). 3 J. Weinstein & M.

Berger, Weinstein's Evidence, par. 702 [03] at 702-16 states:

> [T]he silence of the rule [702] and its drafters should be regarded as tantamount to an abandonment of the [Frye] general acceptance standard.

See, accord, State v. Williams, 388 A2d 500, 503 (Me. 1978); United States v. Downing, 753 F2d 1224, 1236-1239 (3d Cir. 1985). Because the court applied an erroneous standard, this case requires reversal.

There is, moreover, an additional problem with excluding polygraph evidence where, as here, it is offered by the accused in a criminal proceeding. Where the defendant's credibility is important to the outcome of a trial, exclusion of polygraph evidence obtained by use of a qualified examiner infringes upon the defendant's Sixth Amendment right to present witnesses on his behalf.

Chambers v. Mississippi, supra, 93 S.Ct. 1038. In State v. Dorsey, 87 NM 323, 532 P2d 912, 914-915 (1975), aff'd., 88 NM 184, 539 P2d 204 (1975), the court held that a properly administered polygraph test is admissible under Chambers v. Mississippi when the credibility of the defendant is important to the defense:

> The trial record demonstrates that the credibility of defendant was crucial. Tendered questions and answers from the polygraph test were to the effect that defendant did not intend to use his knife when he stopped the car, that he did not pull his knife before he got out of the car, that Doerr had his belt in his hand when defendant pulled his knife and that Doerr struck the first blow. The polygraph examiner would have testified that defendant was telling the truth when he gave the answers referred to above. This testimony was crucial because the questions and answers go both to defendant's intent and to the question of provocation, and thus, under the instructions, to whether defendant committed murder in the second degree or voluntary manslaughter.
>
> The requirements of Chambers v. Mississippi, supra, were met.

In Commonwealth v. Vitello, 381 NE2d 582, 597-599 (Mass. 1978), the court held that polygraph evidence should be admissible for the purpose of impeaching or corroborating the defendant's credibility.

In Israel v. Mc Morris, 643 F2d 458 (7th Cir. 1981), cert. denied, 455 US 967, 102 S.Ct. 1479, the court held that the defendant's due process rights were violated by Wisconsin's procedural rules on the admission of polygraph testimony.

Minnesota's ban on the use of polygraph test results unreasonably and arbitrarily prevented this accused from introducing crucial exculpatory evidence. Because the credibility of defendant's statements was called into question by the state, this evidence was essential to his

defense. Moreover, when the other evidentiary rulings of the Minnesota court are considered, it is plain that the accused was not given a fair opportunity to show that his father, not he, committed the murders.

II. THE STATE OF MINNESOTA DEPRIVED DEFENDANT OF HIS RIGHT TO A FAIR TRIAL BY PRECLUDING HIM FROM POLLING THE JURY.

Minnesota permits a criminal defendant to have a hearing on possible jury prejudice. Schwartz v. Minneapolis Suburban Bus Co., 258 Minn. 325, 104 NW2d 301 (1960). The state, however, has placed a severe burden on this procedure by its application of its requirement that the defendant must make a prima facie showing of prejudice. The State requires

"sufficient evidence which, standing alone and unchallenged would warrant the conclusion of jury misconduct ..." (Opinion, p. 19, A-4). In this case, the defendant submitted evidence that there had been undue pressure placed upon the jury to convict and evidence that the jury had commingled with the press and others during the trial. In addition, an inference of improper influence arises because of the trial court's failure to sequester the jury in violation of its own rules.

The state rejected these offers as insufficient because based on hearsay and because no specific impropriety was shown. It is in the nature of jury tampering, however, that the accused has little way of showing the specific prejudice unless he can poll the jury. The procedure as adopted and applied by the State of

Minnesota fails to adequately protect the defendant's right to a fair trial.

In Estes v. State of Texas, 85 S.Ct. 1628, 1633 (1965), the court noted:

> Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness.
>
> [Quoting In re Murchison, 349 US 133, 136, 75 S.Ct. 623, 625, 99 L.Ed.2d 942 (1955); emphasis supplied by Estes court.]

A defendant's right to an impartial jury is violated whenever there is an "inherently suspect" "possibility of prejudice." Turner v. State of Louisiana, 379 US 466, 85 S.Ct. 546 (1965) (presence of deputy sheriffs who were also witnesses was such an inherently suspect possibility of prejudice despite no evidence of actual taint).

Whenever a jury has been subjected to extraneous outside influences, the law

must presume that the jury was tainted in order to preserve the sanctity of the jury process. In Remmer v. United States, 350 US 377, 76 S.Ct. 425, 428 (1956), this Court stated:

> [I]t is the law's objective to guard jealously the sanctity of the jury's right to operate as freely as possible from outside intrusions improperly made.

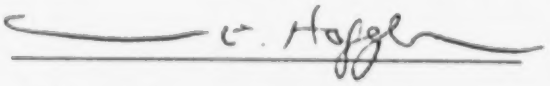
The possibility of improper influence should be sufficient to trigger polling the jury. How else can an accused bring out the facts? If the juror in Remmer had not spoken to the press, the defense never would have known of the incident. Because the court below refused defendant's request for a hearing, we never will know what pressures were exerted upon the jury. Minnesota's stringent application of its prima facie case rule unduly impinges on a defendant's right to an impartial jury.

An additional factor herein contributed to denial of the accused's right to a fair trial. This was a highly publicized, highly emotional, trial. The jury was not sequestered. Daily reports about the murders and the trial proceedings were available to the jury. An accused has a right to a trial not inflamed by excessive community passion and prejudice. Irvin v. Doud, 366 US 717, 81 S.Ct. 1639 (1961). Had defendant's hearing been granted, the jurors may have revealed that the pressure they felt was generated by this publicity.

CONCLUSION

The courts below denied defendant his right to present witnesses on his behalf and his right to a fair and impartial trial, in violation of the Sixth and Fourteenth Amendments to the United States Constitution. The issues raised are important and crucial to the fairness of the jury system. In the event that the petition is granted, Petitioner prays that the judgment below be reversed.

Respectfully submitted,



Clarance E. Hagglund

APPENDIX

STATE OF MINNESOTA Supreme Court

State of Minnesota,
Respondent, JUDGMENT

vs

Steven Todd Anderson,f.k.a. C4-84-964
Steven Todd Jenkins, App.Ct. Case No.
Appellant. K-83-254
Tr. Ct. Case No.

Pursuant to an order of Court heretofore duly made and entered in this cause it is determined and adjudged that the judgment of the Court below, herein appealed from, to wit, of the District Court within and for the County of Lincoln be and the same hereby is affirmed and that judgment be entered accordingly. A certified copy of the entry of judgment and the Court's decision is herein transmitted and made part of the remittitur.

Dated and signed: FOR THE COURT, Dated January 31, 1986, Attest: Wayne Tschimperle, Clerk of the Appellate Courts.

FILED IN THIS OFFICE By: /s/
2-3-86 J.L.dpty. Deputy Assistant
WENDY ROST Clerk
COURT ADMINISTRATOR
IVANHOE, LINCOLN COUNTY,MN

STATE OF MINNESOTA

IN SUPREME COURT

C4-84-964

Lincoln County

State of Minnesota
Respondent,

v.

Steven Todd Anderson,
f.k.a. Steven Todd
Jenkins,
Appellant.

WAHL,J.
Took no part,Kelley,J.
Filed:December 13,
1985
Wayne Tschimperle
Clerk of Appellate
Courts

SYLLABUS

1. The evidence, taken as a whole, identifies defendant, beyond a reasonable doubt, as the person who killed Rudolph Blythe and Deems Thulin.

2. The evidence is sufficient to prove premeditation in the killing of Rudolph Blythe.

3. The trial court properly ruled as to the admissibility of the expert psychiatric testimony, evidence of James

Jenkins' character and past bad conduct, the graphological personality assessment and the polygraph test results.

4. The trial court did not err in denying the motion for a Schwartz hearing based on speculative and doubtful allegations of jury misconduct.

5. Lack of sequestration of the jury during its deliberations, on this record, did not deny defendant a fair trial by an impartial jury.

Affirmed.

OPINION

WAHL, Justice.

Steven Todd Anderson, formerly known as Steven Todd Jenkins, was convicted of the first degree murder[1] of Rudolph Blythe and the second degree murder[2]

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[1] Minn.Stat. §609.185(1)

[2] Minn.Stat. §609.19(1)

of Deems Thulin, by shooting. The trial court sentenced him to concurrent terms of life imprisonment and 116 months imprisonment. He appeals from this judgment of conviction and sentence contending there is insufficient evidence that he killed Blythe and Thulin or that Blythe's killing was premeditated. He also claims he was denied due process and a fair trial by various court rulings and by the court's failure to sequester the jury during deliberations. We affirm the convictions.

The tragedy occurred on the morning of September 29, 1983, when Rudolph (Rudy) Blythe, president of the Buffalo Ridge State Bank of Ruthton, Minnesota and Deems (Toby) Thulin, loan officer, drove to an uninhabited farm owned by the bank to meet a man they believed to be a prospective buyer for the

property. They were shot and killed at the farm. The only other people on the property at the time of the shooting were Steven and his father, James Jenkins.

Steven's parents, James and Darlene Jenkins, had owned the farm, located between Ruthton and Tyler, and had run a small dairy operation there from 1977 to 1980. They had pledged the property as security for a 1979 farm operating loan from Buffalo Ridge State Bank. In 1980, James and Darlene Jenkins divorced, defaulted on the loan and declared bankruptcy. The family abandoned the property shortly thereafter and title passed to the bank. After the divorce and loss of the farm, Steven lived on and off with his mother or his paternal grandparents in Minnesota and with his father in Minnesota, Ohio and Texas. In May, 1983, he returned from Texas to

Minnesota and his father followed several months later.

Father and son planned to begin dairy farming in Minnesota again. They rented a small farm near Hardwick in Rock County. During the months before the murders, James Jenkins sought financing or credit for the proposed operation from many lending institutions and cattle lessors, but credit was repeatedly denied. On September 28, 1983, Jenkins' final effort to negotiate the credit purchase of dairy cattle from a Long Prairie cattle dealer failed. Steven said his father blamed his inability to get credit on the 1980 bankruptcy and on banker Rudolph Blythe who, he believed, was giving him bad credit references. Susan Blythe, vice president of the bank and Rudolph's wife, confirmed that her husband had told prospective lenders about Jenkins'

bankruptcy when they asked for a credit reference.

After being refused credit by the Long Prairie cattle dealer, James Jenkins telephoned Blythe at the bank and, posing as a potential buyer named Ron Anderson, arranged to meet Blythe at the old Jenkins' farm at 10:00 a.m. the next morning, September 29. Steven testified before the grand jury that his father told him, "we were going to go there and rob [Blythe] and scare him, scare the hell out of him." Steven understood the plan included him.

Steven and his father left home in their pick-up truck early the next day for the 10:00 a.m. appointment, with Steven driving. In the truck were four guns (a 12 gauge shotgun, a modified .410 shotgun, a .22 caliber pistol, and the gun later identified as the murder weapon, an M-1

semi-automatic rifle) some ammunition, two knives, three defused hand grenades and assorted military equipment, all belonging to Steven. Steven said he habitually stored the weapons in the cab of the pick-up truck with the exception of his M-1 rifle, which he kept in the corner of his room at night and took with him in the truck whenever he left the house.

The two arrived at their old farm at 8:30 a.m. and parked in the farmyard in front of the garage. A diagram of the farm is attached to this opinion as Appendix 1. James began removing the truck's front license plate. Steven took three guns from the truck, placing the .22 pistol on the seat, and the M-1 rifle and 12-gauge shotgun within reach on the hood of the truck. As James bent to remove the truck's rear license plate, father and son unexpectedly heard a car coming up the

farm driveway. It was still long before 10:00 a.m., when Rudy Blythe was expected. Each, with a gun, ran and hid, Steven behind the garage. The location of James Jenkins during the ensuing incident was not determined at trial. Blythe's green station wagon pulled up the driveway and parked nose-to-nose with the Jenkins' white pick-up truck. Rudy Blythe and Toby Thulin got out of the car and began looking around, shouting "who is here?" Within minutes, a second car, driven by Susan Blythe, Rudy's wife, pulled into the farmyard. Susan had come to the farm to exchange cars with her husband. Rudy told her he thought the white truck belonged to the Jenkins. Susan stood for a few minutes next to her parked car talking with Toby Thulin. As she talked, she watched her husband walk past the station wagon, past the truck and along the west

side of the garage toward a grove of trees that grew behind the building. She marked the most distant point of her husband's path by a ground depression that dropped from the end of the garage to the grove. She described seeing Rudy "walk down into a hole *** I saw him kind of drop off." He did not appear to see anyone, however, and returned to where all three vehicles were parked. While Rudy had been investigating, Susan Blythe heard what she described as a "metallic, creaking kind of sound," a sound which she later identified as the rattle of old rain gutters, piled in the weeds behind the chicken house to the east and back of the garage, when someone stepped on them. When Rudy Blythe returned to the car, he told his wife to go get the sheriff because there were trespassers on the property. As Susan Blythe drove away towards the nearest

town, she saw her husband once again in the garage-grove area and Toby, walking east away from the station wagon, looking around.

Steven maintained, in grand jury testimony admitted at trial, that he remained hiding behind the garage during these events and saw neither his father nor the victims until after the shootings, though he did hear somebody say "something about going to get the police" and one car leaving. Almost immediately after Susan Blythe drove away, however, three shots were fired at Blythe and Thulin at their car, killing Thulin instantly and wounding Blythe. Blythe fled towards the farmhouse front yard and the killer followed. Blythe was shot four times and fatally wounded as he tried to reach the road. He apparently died within a few minutes.

Steven and his father fled the

farm immediately after the shootings. Paul Bartz, passing by the old Jenkins farm on County Road 7 at about 9:00 a.m., turned his truck around to investigate a flash of yellow, which turned out to be Blythe's jacket, in the ditch beside the road. He saw a white Chevy pick-up with a rear Texas license plate "screaming down the driveway." After leaving the farm, Steven and his father drove to Luvurne, bought more ammunition, gasoline and a flashlight, and started for their home in Hardwick. On the road they encountered a Rock County deputy sheriff, Ronald McClure, who turned around and began following them closely. Steven said his father told him to get out and shoot at the policeman. They turned the truck onto a gravel road, Steven got out with the M-1 rifle and shot three times at McClure's car as it passed the

intersection. McClure lay down in the seat, accelerated past the intersection and was not hit.[3] Without returning home, Steven and his father drove into South Dakota and on to Texas, driving at night to avoid police detection. They arrived at Paducah, Texas on Saturday, October 1, 1983. On Sunday, October 2, Steven left his father at the abandoned farm where they were hiding and surrendered to Paducah police, saying he was wanted in connection with some murders in Minnesota. Sometime Sunday night James Jenkins shot himself in the head and died on a county road leading to the abandoned farm.

Steven was brought back to Minnesota in custody. After consulting

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[3] Steven pled guilty in Rock County to a charge of second degree assault, Minn. Stat. §609.222, in connection with this incident.

with his attorney, and being fully advised of his rights by the state's attorney, he gave his version of the shooting and surrounding events to the grand jury. The grand jury returned a six count indictment, charging Steven with:

Count 1: the intentional, premeditated death of Rudolph Blythe, Minn. Stat. §609.185(1) (Murder in First Degree);

Count 2: the intentional death of Rudolph Blythe while committing or attempting to commit aggravated robbery, Minn. Stat. §609.185(3) (Murder in First Degree);

Count 3: the intentional death of Rudolph Blythe, Minn. Stat. §609.19(1) (Murder in Second Degree);

Count 4: the intentional death of Deems Thulin, Minn. Stat. §609.19(1) (Murder in Second Degree);

Count 5 : aiding, advising and conspiring with another in causing the death of Rudolph Blythe while committing or attempting to commit a felony offense against Blythe, where that death was a reasonably foreseeable consequence of the attempted felony, Minn. Stat. §609.19(2), and 609.05(1)(2) (Murder in Second Degree);

Count 6: aiding, advising and conspiring with another in causing the death of Deems Thulin while committing or attempting to commit a felony offense against Thulin when that death was a reasonably foreseeable consequence of the attempted felony, Minn. Stat. §§609.19(2) and 609.05(1)(2) (Murder in Second Degree).

Steven was tried in Ivanhoe before a Lincoln County jury. He had requested, in two separate pre-trial pleadings, "that

all hearings, trials [and] pre-rials be without exception held in Lincoln County in the Ivanhoe Courthouse and nowhere else." The jury found Steven guilty of Count 1, the intentional, premeditated murder of Rudolph Blythe and of Count 4, the intentional murder of Deems Thulin.

This appeal raises the following issues:

(1) Whether the evidence was sufficient to identify defendant as the person who killed Rudolph Blythe and Deems Thulin;

(2) Whether there was sufficient evidence of premediation in the killing of Rudolph Blythe;

(3) Whether the trial court improperly excluded expert psychiatric testimony, polygraph test results, a graphological personality assessment and certain evidence of James Jenkins'

character from evidence;

(4) Whether the trial court erred in denying a defense motion for a Schwartz hearing based on allegations of jury influence, in violation of defendant's right to a fair trial by an impartial jury; and

(5) Whether the trial court's failure to sequester the jury during its deliberations denied defendant a fair trial by an impartial jury.

1. Steven first challenges the sufficiency of the evidence, arguing that the state did not prove beyond a reasonable doubt that he was the person who killed Rudy Blythe and Toby Thulin. Throughout the murder investigation and trial, he maintained his father, not he, was the killer. No other witness to the shootings lived to testify. The state's evidence identifying Steven as the killer

was circumstantial.

A conviction may be based on circumstantial evidence and will be upheld if the "reasonable inferences from such evidence are consistent only with defendant's guilt and inconsistent with any rational hypothesis except that of his guilt." State v. Threinen, 328 N.W.2d 154, 156 (1983) citing State v. Kotka, 277 Minn. 331, 334, 152 N.W.2d 445, 448 (1967), cert. denied 389 U.S. 1056 (1968). A conviction based on circumstantial evidence may stand "only where the facts and circumstances disclosed by the circumstantial evidence form a complete chain which, in the light of the evidence as a whole, leads so directly to the guilt of the accused as to exclude, beyond a reasonable doubt, any reasonable inference other than that of guilt." State v. Wahlberg, 296 N.W.2d

408, 411 (Minn.1980). Despite the stricter standard of review raised by a murder conviction based on circumstantial evidence, a jury is in the best position to evaluate the circumstantial evidence surrounding a murder and the jury verdict must be given due deference. State v. Linder, 304 N.W.2d 902, 906 (Minn.1981).

It is not disputed that two people were murdered at the old Jenkins' farm and that Steven and his father were at the farm when the murders occurred. Steven himself told the grand jury he went to the farm, armed and prepared for some violent encounter with Blythe, and admitted fleeing with his father after the murders and shooting at a deputy sheriff to aid their escape. When he surrendered to Texas authorities, he acknowledged he was wanted in connection with some murders in Minnesota.

The state presented extensive physical evidence at trial describing the features of the farm and the evidence left from the murders. This evidence enabled the jury to reconstruct the sequence of events and determine the credibility of Steven's version of the incident. This presentation included video tapes and slide photographs of the farm, the location and position of the bodies and the shell casings at each shooting site; laboratory analysis of bullets recovered from the bodies and the Blythe car; a reconstruction of the observations of witness Susan Blythe; a reconstruction of shots being fired form the first shoooting site into the Blythe car with the murder weapon; autopsy reports and laboratory analyses of the victims' clothing; and the murder weapon and analyses of test firings.

The physical evidence indicates that almost immediately after Susan Blythe drove away from the farm to fetch the police, a gunman stepped from behind the chicken house and fired three shots from the M-1 semi-automatic rifle at Blythe and Thulin, who had returned to the station wagon, quickly, it would appear, because they were heading away from the car in opposite directions as Susan left. One bullet entered the front passenger side window vent and hit Thulin in the neck, severing his spinal cord and killing him instantly. A second bullet lodged in the car door on Thulin's side. The third went through the front windshield, through the open driver's side window and hit Blythe in the lower back as he crouched beside the driver's-side door. This wound was not fatal nor did it seriously impair Blythe's ability to run or walk for he

appears to have moved 90 yards west from the car after these first shots. Blythe's path led through the farmyard, along a sidewalk south of the farm house and across the front yard. The second set of four shots hit him as he went into a shallow ditch that separates the front yard from County Road 7. He was hit by all four bullets, shot from approximately 90 feet away, where four shell casings were found. The marksman had also moved 90 yards from the first shooting site. Two bullets hit Blythe in the side, very close together, causing fatal wounds. Another bullet hit Blythe's arm, the fourth passed through his jacket. Blythe apparently died within minutes.

The state at trial extensively explored the physical evidence of the murders in light of the respective marksmanship and physical capabilities of

Steven and his father to determine which of the two could have committed the murders. There was evidence of how the murder weapon operated and malfunctioned; evidence of the interest, experience, training and skill of both men in handling and shooting guns, particularly the murder weapon; and evidence of the physical condition of both, including eyesight and ability to run.

The murder weapon was an M-1 series semi-automatic rifle. There was evidence the gun often failed to operate semi-automatically; after firing, the used shell would not leject, but would "jam" the chamber, blocking the new shell. This jamming problem had been corrected the previous winter but the gunsmith testified the problem was a recurring one because of the manufacturing defect. According to a hunting friend of Steven's, the gun was

jamming in the summer of 1984 and Steven himself stated that the gun jammed on the day of the murders when he shot at Officer McClure's squad car. BCA agents, testing the gun after the murders, found that it persistently jammed in test firing. A semi-automatic that jams can still be operated by manually clearing the chamber after firing. This manual operation is slower that semi-automatic function. Because manual operation is slower, the killer's demonstrated ability to shoot quickly and accurately indicated both expert ability and familiarity with the operation of this particular weapon.

Steven owned the murder weapon and had been trained to shoot it by a 31-year Army veteran, Charles Snow, Steven's boss in Texas. Snow, who had once seen Steven dance a tin can across a pond with the weapon, testified that Steven was a

"superb" marksman. Snow also taught Steven the military skill of shooting accurately after running a distance, a skill Steven worked at perfecting by frequent practice. In the months before the murder, after his return to Minnesota, Steven had shot at least 500 rounds in target practice with the gun, indicating familiarity with the M-1's malfunction as well as its usual operation. He was attached to the murder weapon and kept it near him at all times. He was also deeply interested in the military and habitually wore military fatigues and a military-style haircut. He owned several weapons and other military equipment, such as defused hand grenades, etc. and often asked older men in his acquaintance about weaponry, explosives, and military experiences. Steven was an 18-year-old in good physical condition at the time of the murders.

James Jenkins, on the other hand, was 46 years old and physically limited by impaired eyesight and a resulting slowness and hesitancy in his movement. The father suffered from retinitis pigmentosa, a progressive disease causing "tunnel vision," night blindness and, eventually, complete blindness. His corrected vision was 20% of normal in his right eye (the eye with which he would aim a weapon) and 63% of normal in his left eye. While Jenkins could see well enough to work, hold a driver's license and drive during the day, there was evidence his poor vision limited his mobility and made sighting and shooting a gun difficult. Recent associates described him as walking "oddly," as if he had to feel his way along the ground with his feet. There was testimony his eyesight had recently prevented him from being able to use a

mechanical gunsight like that on the murder weapon. In addition, Jenkins had not owned or shot a gun with any frequency for several years, although he may have received training to shoot an M-1 rifle while in the National Guard twenty years earlier. Steven said his father had practiced target shooting only a few times in the last 2-3 years and did not share his son's interest in guns. Jenkins' friend in Texas said he once saw him try to sight a shotgun, but he couldn't focus, and said, "I can't see anything through it." Jenkins refused a deer hunting invitation from this friend, claiming poor eyesight. Jenkins borrowed a shotgun for use in guard duty at his job in Texas, but returned it the next day, saying "I don't want to carry it because if I used it I would get myself killed."

Physical evidence of the murders

indicated the killer shot quickly and with great accuracy. Thulin was killed by one bullet through the neck. Then the killer chased Rudolph Blythe for 90 yards and shot again, hitting his target with all four bullets and placing two of those bullets, the fatal shots, within 1 to 1-1/2 inches of each other. There was evidence running and shooting diminishes the accuracy of marksmanship and the less fit the shooter, the greater the impact of this strenuous maneuver. Faced with this evidence, the jury could well have been forced to conclude, even against their natural sympathies, that Steven, who was young, agile, skilled at running then shooting, and an expert marksman with the M-1, had shot Blythe and Thulin rather than his father, who had limited mobility, a serious visual handicap and rarely handled guns.

The jury was also confronted with the contradictions between Steven's version of events at the farm and Susan Blythe's testimony. Steven claimed he hid behind the garage throughout the shootings and did not see the victims or his father until the murders were over. Susan Blythe, in her testimony, described her husband as walking past the end of the garage, where Steven said he was hiding. The BCA reconstruction of Susn's description conforms that Rudy, in looking for trespassers, could have been seen along the north end of the garage where Steven claimed to be hiding. Steven also said he did not hear the metallic noise described by Susan Blythe, even though his position behind the garage was closer to its source, the pile of rain gutters behind the chicken coop, than was hers. The conflicts between their testimony are

significant. If Steven was behind the garage, he would have seen Rudy walk past the building and into the grove. If he did not, it seems likely Susan Blythe's "metallic noise" was made by his stepping on the rain gutters as he ran from behind the garage around the chicken coop to avoid being seen by Rudy as he investigated. The first set of shots was fired from the corner of the chicken coop.

Susan Blythe's testimony conflicted with Steven's in another way. As she drove away from the farm to contact the sheriff, she testified her husband and Toby were walking away from the station wagon, in different directions. Steven's testimony was that the shooting began 15-20 seconds after he heard Susan Blythe's car leave the farm. In the time period after her departure and before the shooting, he said he heard no sounds that

would explain why the victims suddenly, quickly and quietly returned to their car. The jury could reasonably have concluded that some confrontation or warning event happened during that time, causing the victims to run back to their car.

In State v. Lloyd, 345 N.W.2d 240, 245 (Minn. 1984), this court held that resolving conflicting testimony is the exclusive function of the jury because it has had the opportunity to observe the demeanor of witnesses and to weigh their credibility. It is for the jury to determine the weight and credibility of the testimony of the individual witnesses. State v. Engholm, 290 N.W.2d 780, 784 (Minn. 1980). On review, we will "assume that the jury believed the State's witnesses and disbelieved everything which contradicted their testimony." State v. Wahlberg, 296 N.W.2d 408, 411 (Minn.

1980). The jury verdict in this case indicates that the jury did not believe Steven's version of events.

Steven argues strongly that he had no motive to kill Blythe, whereas his father did. Proof of motive is not required to prove guilt of murder. However, motive helps form inferences from a pattern of circumstantial evidence. James Jenkins had the more apparent motive to harm Rudy Blythe. There was evidence that he lost his farm to Blythe in 1980, that he believed Blythe was a cause of his inability to get the credit necessary to begin farming again and that he expressed some sexual jealousy of the banker. Although there was no evidence that Steven and Rudy knew one another, the jury could have concluded that any motive Steven might have had derived from his father's and grew out of their closeness and common

purpose to begin a new life farming together.

We have reviewed the record in great detail, ascertaining, as did the jury, the pattern of circumstantial evidence. Under the Threinen standard of review, the reasonable inferences from this pattern of circumstantial evidence must be "inconsistent with any rational hypothesis except that of [defendant's] guilt. Threinen, 328 N.W.2d at 156. The evidence as a whole need not exclude all possibility that the father, not the son, was the killer. It must, however, make that theory seem unreasonable. We hold that the evidence, taken as a whole, meets this strict standard and identifies Steven, beyond a reasonable doubt, as the person who killed Rudy Blythe and Toby Thulin.

2. Steven next argues that even

if he is identified as the killer, there is not sufficient evidence to prove he killed Rudy Blythe with premeditation. Blythe's murderer clearly intended to kill him. Premeditation is more than intent to kill, however. State v. Ulm, 326 N.W.2d 159, 162 (Minn. 1982). Premeditation, according to Minn. Stat. section 609.18, means "to consider, plan or prepare for, or determine to commit, the act referred to prior to its commission." Premeditation is inferred from words and actions in light of the totality of surrounding circumstances. State v. Hardimon, 310 N.W.2d 564, 566 (Minn. 1981). As a state of mind, premeditation can usually only be proved circumstantially, and the jury is considered best able to weigh the evidence. State v. Linder, 304 N.W.2d 902, 906 (Minn. 1981).

Key evidence of premeditation in this case was that Blythe's killer shot repeatedly and chased his victim from the first shooting site to the second shooting site to fire the fatal shots. Also, Steven admitted he went to the farm with a violent plan to "rob and scare" Rudy Blythe. He and his father arrived at the farm with numerous weapons and Steven admitted he took 3 of those weapons out of the truck, indicating intent to use them.

Thee circumstances resemble those in State v. Amos, where a defendant who deliberately armed himself and ran across the street to shoot his victim was found to have acted with premeditation. 347 N.W.2d 498, 501 (Minn. 1984). Premeditation may be formed almost instantaneously. State v. Neumann, 262 N.W.2d 426, 430 (Minn. 1978). Though Steven was not charged with the

premeditated killing of Thulin, it is consistent with this court's rulings to find he formed the requisite "plan" in the interim between the two murders as he chased Blythe. We hold the evidence sufficient to prove the element of premeditation in the death of Rudy Blythe.

3. Steven contends the trial court improperly excluded certain evidence offered at trial to prove a duress defense or to prove that his father, not he, killed Blythe and Thulin. The evidence he offered included: expert psychiatric testimony that his father was mentally unstable or insane; character evidence and evidence of specific incidents of bad conduct to show his father was angry, belligerent, cruel to animals, suicidal and had threatened to harm and kill others; and, a graphological assessment of his father's personality. Steven also

offered his own polygraph test results. The trial court excluded certain portions of this evidence and ruled other portions could be offered at trial.

At the conclusion of the trial, defense counsel stated Steven was abandoning the duress defense. The trial court agreed insufficient evidence pertaining to duress had been offered to submit the issue to the jury. In his post-trial motion for new trial or to vacate judgment, Steven argued the trial court exclusion of certain evidence destroyed his duress defense and violated his constitutional rights under the sixth and fourteenth amendments. These motions were denied by the trial court judge.

The proferred expert psychiatric testimony consisted of an assessment of his father's personality and of Steven's relationship with his father. The

assessment was based on interviews with Steven and with his family, all conducted after the murders and his father's suicide. The trial court excluded this evidence on two grounds. First, that the psychiatric evaluation was entirely based on hearsay as regards its conclusions about James Jenkins and, therefore, was too speculative and unreliable an opinion to be competent. The trial court also ruled that the duress evidence offered related to the influence of the father over his son and this was a matter within the common experience of a jury so as to preclude the necessity for expert testimony. Expert testimony is admitted under Minn.R.Evid. 702 if it will assist the trier of fact to understand the evidence or to determine a fact in issue. Even if relevant, evidence may be excluded under Minn.R.Evid. 403 if its probative

value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. We hold the trial court properly excluded this evidence.

Steven offered into evidence his own polygraph test results. He also offered a graphological personality assessment of his father, an analysis of handwriting, to show that his father was a violent, threatening man. The trial court excluded both as too unreliable to have probative value. The scientific technique on which expert testimony is based must be scientifically reliable and broadly accepted in its field. Frye v. United States, 293 F. 1013, 1014 (D.C.Cir. 1923). State v. Mack, 292 N.W.2d 764, 768 (Minn. 1980). Polygraph test results are not admitted in Minnesota civil or criminal actions because there is

insufficient evidence of their reliability. State v. Michaeloff, 324 N.W.2d 926, 927 (Minn. 1982). We affirm that judgment of unreliability here. The polygraph test results were properly excluded.

The admissibility of a graphological personality assessment is a matter of first impression in this state. "Graphology" is defined in Webster's New Collegiate Dictionary (1977) as "the study of handwriting especially for the purpose of character analysis." Thus, graphological analysis is distinct from handwriting analysis, widely accepted by this court and others as a means to identify a signature as that of a particular signer. Most other jurisdictions that have considered the admissability of expert graphological personality assessment have excluded it as

too scientifically unreliable. See, People v. Hester, 39 Ill.2d 489, 237 N.E.2d 466, 480 (1968) (handwriting analysis of note victim was writing at moment she was attacked to show her state of mind excluded) cert. denied, 397 U.S. 660 (1970); Daniels v. Cummins, 66 Misc.2d 575, 580-82, 321 N.Y.S.2d 1009, 1014-16 (N.Y.Sup. 1971) (handwriting expert may give opinion of genuineness of signature, but may not testify as to signer's mental state or capacity). Our review of the scientific literature indicates that the technique of graphology is accorded a low measure of scientific reliability in predicting character or state of mind and is not generally accepted in the scientific fields of psychology and psychiatry. For these reasons, a graphological personality assessment does not meet the standard

required for admission of expert testimony under Frye and its Minnesota progeny. We hold the exclusion of a graphological personality assessment of James Jenkins was proper.

Steven also offered evidence of his father's general reputation and specific acts of past bad conduct to prove his duress defense and that his father, acting in conformity with that reputation or behavioral history, was the killer of Blythe and Thulin. The trial court ruled such evidence admissible only to the extent it would be admitted against James Jenkins himself under Minn.R.Evid. 404 (a) and (b) were he a defendant. All exceptions to the general bar on bad character evidence would apply, allowing in evidence showing "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or

accident." Minn.R.Evid. 404(b). Thus, any evidence that James threatened or behaved threateningly towards the victims would be admitted. Further, the trial court ruled admissible any evidence of James' character or bad conduct relevant to Steven s proposed duress defense. The court was willing to consider any evidence with "some bearing on the general issue of intent," including conduct or statements by the father that occurred in Steven's presence or within his awareness, or evidence demonstrating "the nature of the relationship" between father and son.

The trial court's general ruling on character evidence conforms to the guidelines we set out in State v. Hawkins, 260 N.W.2d 150, 158-59 (Minn. 1977) which require a proper foundation of facts connecting a third person to the crime before otherwise excluded character

evidence of that person may be introduced to raise a reasonable doubt that the accused committed the crime. James Jenkins was connected to the crimes by his past dealings with Blythe, by his telephone call luring Blythe to the farm and by his presence at the scene. We hold the trial court properly determined the admissibility of evidence of James Jenkins' character offered either to prove Steven acted under duress or that his father was the killer.

4. Following return of the jury verdict, defense counsel moved the trial court to conduct a Schwartz hearing to investigate alleged incidents of jury misconduct. See Schwartz v. Minneapolis Suburban Bus Co., 258 Minn. 325, 104 N.W.2d 301 (1960). A Schwartz hearing is not mandated until a defendant establishes a prima facie case of jury

misconduct. State v. Larson, 281 N.W.2d 481, 484 (Minn. 1979), cert. denied, 444 U.S. 973 (1979). To establish a prima facie case, sufficient evidence "which, standing alone and unchallenged would warrant the conclusion of jury misconduct" must be submitted. Id. Generally, such hearings are to be liberally granted. Olberg v. Minneapolis Gas Co., 291 Minn. 334, 343, 191 N.W.2d 418, 424-25 (1971). The trial court denied the motion because Steven presented no evidence which, to the court, reasonably suggested jury misconduct.

Steven's counsel submitted three affidavits to establish a prima facie case. One relayed the comments of a juror, reported through a chain of conversations, that she felt she was "exposed to tremendous pressure in the Jenkins trial." A second affidavit, from

Steven's mother, stated she had seen female jurors using the courthouse public bathrooms during the trial and described "much commingling between Jury, Press and audience." She also stated she heard jurors say they were going to watch themselves on television. A final affidavit by defense counsel described a conversation during the trial between a newspaper reporter and the jury foreperson. This last incident was brought to the court's attention during the trial, whereupon the court held a hearing in chambers and found the subject of the conversation to be a prescription medicine for an ailing back. The court then delivered an additional admonition to the jury about their duty to avoid outside contacts.

A prima facie case for a Schwartz hearing may be based on

hearsay, as was much of the evidence submitted in these affidavits, but the case alleged may not be "wholly speculative." See also, State v. Mings, 289 N.W.2d 497, 498 (Minn. 1980); Olberg, 291 Minn. at 342, 191 N.W.2d at 424. In the affidavits before the trial court, the alleged jury behavior is only vaguely described and the credibility of the statements ascribed to certain jury members is doubtful because their alleged remarks are reported through multiple levels of hearsay. Such allegations are insufficient to establish a prima facie case. We hold the trial court did not err in denying the motion for a Schwartz hearing based on speculative and doubtful allegations of jury misconduct.

5. The final issue is whether the trial court's failure to sequester the jury during its deliberation denied Steven

a fair trial by an impartial jury. The court recessed the jury overnight during its deliberations. Steven neither consented nor objected to this separation, nor had he previously requested sequestration. The next morning when the jurors returned to complete their deliberations, Steven did not request that the trial court question them about any outside influences they may have encountered, nor did the trial court, on its own, conduct such an inquiry.

Steven correctly notes that Minn.R.Crim.Pr. 26.03, subd. 5(1) requires the jury to be sequestered if they recess overnight during deliberations unless the defendant consents to the separation. We have recently held, however, that mere separation of the jury in violation of Minn.R.Crim.P. 26.03, subd. 5, without more, does not raise a

presumption of prejudice. State v. Sanders, ___ N.W.2d ___ (Minn. 1985) (CO-83-1812, filed October 18, 1985). Prejudice in such a case will be presumed only upon a showing of any private communication or contact or any other circumstance suggestive of improper influence or jury tampering, direct or indirect. The State will then bear the burden of overcoming the presumption. Id. The record before us contains no showing of any such private communication or contact or any other circumstance such as pervasive, unfavorable publicity suggestive of improper influence or jury tampering, direct or indirect. Nor do the circumstances of the separation justify an inference of prejudice. We hold that lack of sequestration of the jury during its deliberation, on this record, did not deny Steven a fair trial by an impartial jury.

Because we find no error in the trial court's rulings or actions, and because the evidence is sufficient to prove beyond a reasonable doubt that Steven, not the father, killed Rudolph Blythe and Deems Thulin and that the killing of Rudolph Blythe was premeditated, we affirm the convictions and sentences in this case.

Affirmed.

KELLEY J., took no part in the decision or consideration of this case.

[Appendix 1, diagram of Jenkins farm, omitted herefrom.]

RULE 402. RELEVANT EVIDENCE GENERALLY ADMISSIBLE; IRRELEVANT EVIDENCE INADMISIBLE

All relevant evidence is admissible, except as otherwise provided by the United States Constitution, the State Constitution, statute, by these rules, or by other rules applicable in the courts of this state. Evidence which is not relevant is not admisible.

RULE 405. METHODS OF PROVING CHARACTER

(a) Reputation or opinion. In all cases in which evidence of character or a trait of character of a person is admisible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

(b) Specific instances of conduct.

In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of his conduct.

RULE 702. TESTIMONY BY EXPERTS

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

RULE 703. BASES OF OPINION TESTIMONY BY EXPERTS

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type

reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Minnesota Rules of Criminal Prodecure, 26.03

Subd. 5. Sequestration of the Jury.

(1) In the Discretion of the Court. During the period from the time the jurors are sworn until they retire for deliberation upon their verdict, the court, in its discretion, may either permit them and any alternate jurors to separate during recesses and adjournments or direct that they be continuously kept together during such period under the supervision of proper officers. With the consent of the defendant the court, in its discretion, may allow the jurors to separate over night during deliberation. The officers shall not speak to or

communicate with any juror concerning any subject connected with the trial nor permit any other person to do so, and shall return the jury to the courtroom at the next designated trial session.

Supreme Court, U.S.
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No. 85-1622

IN THE

Supreme Court of the United States

October Term, 1985

STEVEN TODD ANDERSON, FORMERLY
STEVEN TODD JENKINS,

Petitioner,

vs.

STATE OF MINNESOTA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether the exclusion of certain evidence at trial was presented to the Minnesota Supreme Court as a substantial federal question which was resolved on federal grounds.

II. Whether the denial of a post-trial hearing on jury misconduct was presented to the Minnesota Supreme Court as a substantial federal question which was resolved on federal grounds.

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Authorities	iv
The Opinion Below	1
Statement of the Case	2
Reasons for Denying Certiorari	4
I. The State Court Decision Was Neither Considered Nor Resolved Upon Federal Grounds	4
II. The State Court Decision Implicates No Substantial Federal Question	6
Conclusion	10

TABLE OF AUTHORITIES

Federal Decisions:	Page
Chambers v. Mississippi, 410 U.S. 284 (1973)	6, 7
Estes v. Texas, 381 U.S. 532 (1965)	9
Fox Film Corp. v. Muller, 296 U.S. 207 (1935)	5
Green Bay & Miss Canel Co. v. Patten Paper Co., 172 U.S. 58 (1898)	6
Harding v. Illinois, 196 U.S. 78 (1904)	6
Lynch v. New York ex rel. Pierson, 293 U.S. 52 (1934)	5
Palmer Oil Corp. v. Amerada Corp., 343 U.S. 390 (1952)	4, 5, 6
Remmer v. United States, 350 U.S. 377 (1956)	9
Street v. New York, 394 U.S. 576 (1969)	5, 6
Turner v. Louisiana, 379 U.S. 466 (1965)	9
Washington v. Texas, 388 U.S. 14 (1967)	6, 7
Zucht v. King, 260 U.S. 174 (1922)	4, 6
Decisions From Other Jurisdictions:	
State v. Anderson, 379 N.W.2d 70 (Minn. 1985)	4, 8, 9
State v. Bouwman, 328 N.W.2d 703 (Minn. 1982)	8
Secondary Authorities:	
Annot., 43 A.L.R. Fed. 68 (1979)	8

IN THE

Supreme Court of the United States

October Term, 1985

No. 85-1622

TEVEN TODD ANDERSON, FORMERLY
STEVEN TODD JENKINS,

Petitioner,

vs.

STATE OF MINNESOTA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

RESPONDENT'S BRIEF IN OPPOSITION

THE OPINION BELOW

Petitioner seeks a Writ of Certiorari to review the Judgment and Opinion of the Supreme Court of Minnesota in *State v. Anderson*, 379 N.W.2d 70 (Minn. 1985).

STATEMENT OF THE CASE

Petitioner was tried in April, 1984, on a six count indictment stemming from the ambush slayings of two men near Ruthton, Minnesota, on September 29, 1983. The jury returned verdicts of guilty for the highest level of homicide charged for each of the respective victims: first degree murder (premeditated) for the death of Rudolph Blythe, and second degree murder (intentional) for the death of Deems Thulin. By its verdicts the jury confirmed that petitioner was the actual killer of Blythe and Thulin.

Before trial petitioner noted an intent to present the defense of duress. In essence his pre-trial claim was that his participation in the murders was prompted by fear of his father, James Jenkins, who committed suicide after the murders.

Minnesota law limits the duress defense to acts produced by the compulsion of another, "who by threats creates a reasonable apprehension in the mind of such participator that in case of refusal he is liable to instant death . . . ." Minn. Stat. § 609.08 (1984).[1]

Petitioner offered no evidence of duress at trial: no evidence of compulsion, no evidence of threats, and no evidence of reasonable apprehension of imminent death. He neither

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[1] The entire statute provides as follows:

609.08 DURESS.

Except as provided in section 609.20, clause (3), when any crime is committed or participated in by two or more persons, any one of whom participates only under compulsion by another engaged therein, who by threats creates a reasonable apprehension in the mind of such participator that in case of refusal he is liable to instant death, such threats and apprehension constitute duress which will excuse such participator from criminal liability.

testified himself nor offered the testimony of any other witness which would have any relevance to this defense.

What petitioner wanted to offer in supposed support of the duress defense was evidence of various sorts which was far beyond the pale of admissibility under Minnesota law. This included the testimony of a psychiatrist who performed a psychiatric autopsy upon the personality of his father, and other witnesses who allegedly would have testified to negative aspects of the father's character and past behavior.

Another aspect of petitioner's pre-trial posture was that his father, not he, was the actual executioner of Blythe and Thulin. To support this he offered polygraph test results as well as the above-described evidence.

The above evidence was all the subject of pre-trial motions and rulings on admissibility. The psychiatric evidence concerning the father's personality and the polygraph test results were excluded under well-established principles of Minnesota law. The psychiatric opinion evidence was governed by *State v. Bouwman*, 328 N.W.2d 703 (Minn. 1982), and the polygraph evidence was governed by *State v. Michaeloff*, 324 N.W.2d 926 (Minn. 1982) and *State v. Wakefield*, 263 N.W.2d 76 (Minn. 1978).

Petitioner's proposed evidence regarding his father's character and past conduct were not the subject of outright exclusion. Rather, the trial court set guidelines for the admissibility of the evidence consistent with Minnesota Rules of Evidence, which are patterned after the Federal Rules. The Minnesota Supreme Court summarized this ruling as follows:

> The trial court ruled such evidence admissible only to the extent it would be admitted against James Jenkins himself under Minn. R. Evid. 404(a) and (b) were he a defendant. All exceptions to the general bar on bad

> character evidence would apply, allowing in evidence showing "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Minn. R. Evid. 404(b). Thus, any evidence that James threatened or behaved threateningly towards the victims would be admitted. Further, the trial court ruled admissible any evidence of James' character or bad conduct relevant to Steven's proposed duress defense. The court was willing to consider any evidence with "some bearing on the general issue of intent," including conduct or statements by the father that occurred in Steven's presence or within his awareness, or evidence demonstrating "the nature of the relationship" between father and son.

State v. Anderson, 379 N.W.2d 70, 79-80 (Minn. 1985).

Following the jury verdict, petitioner requested a post-trial hearing to inquire into the possibility of jury misconduct. The request was denied because petitioner failed to present any evidence reasonably suggesting jury misconduct. As with the other issues now presented to this Court, the jury misconduct issue was resolved entirely on the basis of state law. *Id.* at 80.

REASONS FOR DENYING CERTIORARI

I. THE STATE COURT DECISION WAS NEITHER CONSIDERED NOR RESOLVED UPON FEDERAL GROUNDS.

It is axiomatic that before this Court can obtain jurisdiction under any part of 28 U.S.C. § 1257, there must be a substantial federal question raised, litigated and decided in the state court proceedings. *See Zucht v. King*, 260 U.S. 174 (1922); *Palmer Oil Corp. v. Amerada Corp.*, 343 U.S. 390

(1952). The petitioner for certiorari must specifically establish that the federal question was properly raised at the state court level, *Street v. New York*, 394 U.S. 576, 582 (1969), and that the federal question was a necessary component of the state court decision. *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935); *Lynch v. New York ex rel. Pierson*, 293 U.S. 52, 54 (1934).

The petition in this case is totally defective under these standards. The only record submitted to this Court by petitioner is the judgment and opinion of the Minnesota Supreme Court, which alone reveal the absence of federal question litigation in the proceedings below.

The evidentiary questions and the jury misconduct allegation which petitioner is attempting to elevate to issues of constitutional dimension are discussed at length by the Minnesota Supreme Court at 379 N.W.2d 70, 78-80. Other than one brief reference to petitioner's post-trial motion, there is no mention whatsoever of federal issues or constitutional authorities. *See* 379 N.W.2d at 78. All of these issues are discussed and decided entirely upon the governing authority of state law.

The reason for the dearth of federal authority in the state court decision is simply that the arguments relied upon by petitioner before this Court were not urged upon the court below. Between the Appellant's and Respondent's briefs in the Minnesota Supreme Court, 23 pages were devoted to the evidentiary and jury misconduct issues now before this Court. In that entire span there were just two federal citations; *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), cited on the admissibility of scientific test results; and *Wheaton v. United States*, 133 F.2d 522 (10th Cir. 1943), cited on the proof burden for jury misconduct allegations. Neither of

those cases are cited in the Petition For Writ filed in this Court; and conversely *none* of the cases cited in the Petition were brought to the attention of the state court.

Petitioner's failure to demonstrate that the state court either considered or resolved these issues upon federal grounds must result in a denial of certiorari. *See Street v. New York*, 394 U.S. 576 (1969); *Harding v. Illinois*, 196 U.S. 78, 86 (1904); *Green Bay & Miss Canel Co. v. Patten Paper Co.*, 172 U.S. 58, 91 (1898).

II. THE STATE COURT DECISION IMPLICATES NO SUBSTANTIAL FEDERAL QUESTION.

Another recognized prerequisite to jurisdiction under 28 U.S.C. § 1257(3) is that any federal question at issue must be substantial. *See Palmer Oil Co. v. Amerada Petroleum Corp.*, 343 U.S. 390, 391 (1952); *Zucht v. King*, 260 U.S. 174, 176 (1922). The very obvious reason why the alleged federal questions in the Petition For Writ were not litigated in state court is that they are *not* substantial.

Petitioner has identified four separate rulings by the trial court, all affirmed by the Minnesota Supreme Court, which he now claims were constitutional error. The first three were evidentiary rulings: (1) the exclusion of psychiatric opinion testimony concerning his father's personality; (2) the exclusion of polygraph test results; and (3) the exclusion of remote and irrelevant testimony regarding his father's character and past conduct. The fourth ruling was the denial of petitioner's post-trial motion for a hearing on alleged jury misconduct, where no evidence had been presented which reasonably suggested the possibility of jury misconduct.

Petitioner rests his claim on the exclusion of evidence upon *Washington v. Texas*, 388 U.S. 14 (1967) and *Chambers v.*

Mississippi, 410 U.S. 284 (1973). Both of those cases involved state court rules which precluded murder defendants from examining witnesses who themselves had confessed to committing the crime. Additionally, in *Chambers* the defendant was precluded from calling witnesses to the confession.

In both cases, this Court held that such radical curtailment of a defendant's right to present a defense was violative of the Constitution. The state rule in *Washington* was repugnant to the Constitution because it "arbitrarily denied [defendant] the right to put on the stand a witness who was physically and mentally capable of testifying to events that he had personally observed, *and whose testimony would have been relevant and material to the defense.*" *Washington v. Texas*, 388 U.S. at 23 (emphasis added).

In *Chambers*, on the other hand, it was the combined effect of excluding both the examination of the confessing witness and the witnesses to the confession which resulted in constitutional error. *See Chambers v. Mississippi*, 410 U.S. at 302-03. The Court stressed, however, that *Chambers* was an egregious fact case, and that the holding did not "signal any diminution in the respect traditionally accorded to the States in the establishment and implementation of their own criminal trial rules and procedures." *Id.*

The challenged evidentiary rulings in this case are in no way analogous to the state court rulings in *Washington* and *Chambers*. Far from being "relevant and material" as in *Washington*, the excluded evidence here suffered the severe defects of being speculative, unreliable, remote, and irrelevant.

The psychiatric opinion testimony was an analysis of petitioner's father based upon interviews with petitioner and his family *after* the father's death. The evidence was offered to demonstrate that petitioner acted under duress, which is to

say that he lacked criminal intent. As noted by the Minnesota Supreme Court, the evidence "was too speculative and unreliable an opinion to be competent." *State v. Anderson,* 379 N.W.2d 70, 79 (Minn. 1985).

The exclusion of the psychiatric evidence at trial was based also upon *State v. Bouwman,* 328 N.W.2d 703 (Minn. 1982), which established the inadmissibility of psychiatric opinion testimony on the issue of criminal intent, except where the defense is mental illness or mental deficiency. This Minnesota rule rests upon the determination that psychiatric opinion on the subject of intent "is argumentative and of no probative value." *Id.* at 705.

The exclusion of polygraph test results was likewise based upon a Minnesota rule which is well reasoned and well established. The court below states it succinctly: "Polygraph test results are not admitted in Minnesota civil or criminal actions because there is insufficient evidence of their reliability." *State v. Anderson,* 379 N.W.2d at 79. This rule accords with the rule applied in most federal courts. *See generally,* Annot., 43 A.L.R. Fed. 68 (1979).

Finally, the state court's ruling on the admissibility of character evidence and specific acts of past conduct by petitioner's father was not at all as described in the Petition For Writ. Rather, the ruling was as described by the Minnesota Supreme Court, *see* 379 N.W.2d at 79-80, which of course is the entire record before this Court.

The official account of that ruling, as opposed to petitioner's account, reveals that the trial court granted petitioner liberal opportunity to introduce all relevant evidence suggesting either duress or the possibility that James Jenkins did the killing. *Id.* Contrary to petitioner's assertion in this Court, he was *not* precluded from introducing evidence of his father's

character, prior acts, or prior statements. The exclusionary effect of the ruling merely precluded evidence which was grossly irrelevant.

Thus, the evidentiary rulings complained of by petitioner can hardly be characterized as presenting substantial federal questions. Quite to the contrary, the rulings were direct applications of well-founded and generally accepted rules of evidence. Therefore, even if these rulings had been litigated in state court as federal questions (which they were not), and even if the court below had resolved them as federal questions (which it did not), they would still be inappropriate for certiorari because of a total want for substantiality.

Petitioner's last allegation of error pertains to the denial of his request for a post-trial hearing into possible jury misconduct. He relies upon *Estes v. Texas*, 381 U.S. 532 (1965), *Turner v. Louisiana*, 379 U.S. 466 (1965) and *Remmer v. United States*, 350 U.S. 377 (1956).

None of the above cases touch upon the issue in the court below, which was whether a post-trial hearing was required where petitioner presented no evidence suggesting jury misconduct. The only two dealing with jury issues, *Turner* and *Remmer*, involved fact situations which mandated the reversal of convictions.

The opinion of the Minnesota Supreme Court in this case reflects Minnesota's liberal inclination to grant hearings on alleged jury misconduct. *See State v. Anderson*, 379 N.W.2d at 80. It also reflects, however, the simple fact that petitioner's request for such a hearing was frivolous and totally without merit. *Id.* Unlike the *Turner* and *Remmer* cases, here there was no evidence whatsoever of misconduct or tampering—only rank speculation and innuendo.

As with the evidentiary issues, the jury misconduct issue was neither litigated nor resolved on federal grounds by the court below. Also like those issues, this claim is altogether lacking in substantiality.

CONCLUSION

For these reasons the Petition For A Writ Of Certiorari should be denied.

Respectfully submitted,

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